United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL **77-7187**

To be argued by
GERALD WALPIN

United States Court of Appeals
For the Second Circuit

Docket Nos. 77-7187, 77-7271, 77-7273

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, in behalf of its membership affected and in behalf of Classes involved herein, GARY MICHAEL, MICHAEL FAGAN, and MARTIN F. RANDOLPH, JR., individually and as Class Representatives, and in behalf of all other parties similarly situated and circumstanced, *Plaintiffs,*

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, MARTIN F. RANDOLPH, JR., GARY MICHAEL and MICHAEL FAGAN, *Plaintiffs-Appellants.*

I. WALTON BADER, *Appellant,*

v.

TELEPROMPTER CORPORATION, TOUCHE, ROSS & COMPANY, HERBERT SCHLAFLY, WILLIAM BRESNAN, MARVYN CARTON, "JOHN DOE" and "RICHARD ROE", the names "JOHN DOE" and "RICHARD ROE" being fictitious, the parties intended being those persons, firms, corporations and associations involved in the unlawful acts involved herein, *Defendants,*

TOUCHE ROSS & Co., *Defendant-Appellee.*

UNITED STATES COURT OF APPEALS
OCT 3 1977

HARRY LEWIS, *et al.*, *Plaintiffs,*

v.

TELEPROMPTER CORP., *et al.*, *Defendants.*

BRIEF OF DEFENDANT-APPELLEE TOUCHE ROSS & CO.

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United States Court of Appeals

For the Second Circuit

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, *et al.*,
Plaintiffs,

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, MARTIN F. RANDOLPH, JR., GARY MICHAEL and MICHAEL FAGAN,
Plaintiffs-Appellants,

I. WALTON BADER, *Appellant,*

v.

TELEPROMPTER CORPORATION, *et al.*, *Defendants,*

TOUCHE ROSS & CO., *Defendant-Appellee.*

HARRY LEWIS, *et al.*, *Plaintiffs,*

v.

TELEPROMPTER CORPORATION, *et al.*, *Defendants.*

BRIEF OF DEFENDANT-APPELLEE TOUCHE ROSS & CO.

Statement

By order dated January 9, 1976, the United States District Court for the Southern District of New York (Owen, J.), on motion of appellee Touche Ross & Co. ("Touche Ross") pursuant to Fed. R. Civ. P. 37(b) and (d),* and after an evidentiary hearing, dismissed the complaint of plaintiffs in the action entitled *Independent Investor Protective League, et al.* v. *Teleprompter Corporation, et al.*, as against Touche Ross, one of the defendants in the action. The District Court also directed that expenses, including attorneys' fees, be paid by plaintiff Independent Investor Protective League ("IIPL") and plaintiffs' counsel, I. Walton Bader, Esq. Further, the District Court stated that, with respect to Mr. Bader, it was referring the record

* The words "Rule" or "Rules" refer, unless otherwise indicated, to the Federal Rules of Civil Procedure.

for further consideration pursuant to Rule 5(f) of the General Rules of the District Court providing for the disciplining of attorneys (JA A25-42).*

An appeal was taken from this order on January 23, 1976, which appeal was dismissed by this Court on September 17, 1976 as taken from a non-final order, *inter alia* since the expenses had not then been fixed by the District Court (JA A17; 655-656). This decision is reported in 542 F. 2d 156.

By order dated March 4, 1977 (amended March 11, 1977) the District Court fixed the reasonable expenses at $8,074.38, including $7,500 as attorneys' fees (JA 941-943). By further order filed May 9, 1977, the District Court found, pursuant to Rule 54(b), that there was no just reason for delay in entering final judgment dismissing plaintiffs' claims against Touche Ross with prejudice and granting final judgment to Touche Ross against IIPL and Mr. Bader for said $8,074.38 and directed the entry of such final judgment, which was done on May 11, 1977 (JA 956-958). This appeal is taken from said order and judgment (JA 963-965).**

The action in which Touche Ross' motion was made is a class action on behalf of stockholders of Teleprompter Corp. ("Teleprompter") brought by four plaintiffs [namely, IIPL, Martin F. Randolph, Jr. ("Randolph"), Michael Fagan ("Fagan") and Gary Michael ("Michael")] against Teleprompter, Touche Ross and other defendants alleging violations of the Securities Act of 1933 and the Securities Exchange Act of 1934 (JA 360 *et seq.*, 386 *et seq.*). IIPL is allegedly an unincorporated membership organization whose members include the individual

* The symbol "JA" in parentheses refers to pages of the Joint Appendix. There are certain pages therein preceded by the symbol "A——" which are preceded herein by the letter A.

** Three separate notices of appeal were filed from said order and judgment by the appellants. Docket Nos. 77-7187, 77-7271, 77-7273. The first (Docket No. 77-7187) was filed on April 22, 1977, before the order was even made (JA A17), and was dismissed by this Court with double costs as premature and nugatory. This Court thereafter ordered the several dockets consolidated.

plaintiffs—Randolph, Fagan and Michael—and other stockholders of Teleprompter (JA 386 *et seq.*).*

Summary of Facts and Issue

After plaintiffs had failed to answer simple interrogatories of Touche Ross outstanding for 9½ months despite directions to do so, the Court ordered that they be answered within 20 days. On the last day for compliance with the order, copies of purported answers were mailed to create the belief that due and timely service was being made when in fact such was not the case. After further misleading Touche Ross' counsel as to the existence of the answers, false testimony was given and a "concocted story" was presented to mislead the Court as well at a hearing with respect to whether there had been compliance with the order. The Court concluded from the evidence that its order had not been complied with, dismissed plaintiffs' claims with prejudice as to Touche Ross, and directed that Touche Ross recover its reasonable expenses. Plaintiffs' claims against the other defendants were not affected by the order and Touche Ross remains a defendant in the consolidated action to respond to the claims of other members of the class. The question is whether the District Court abused its discretion in taking the action it did for failure in bad faith to comply with its order.

Facts

Appellants' briefs** give an incomplete, distorted and disjointed version of the facts. Indeed, although appel-

* After Touche Ross' motion had been made on September 13, 1974 before Hon. Richard Owen, U.S.D.J., to whom the case was then assigned, and after he had conducted an evidentiary hearing on November 4, 13 and 14, 1974, and while the motion was pending before him, the action was on November 18, 1974 consolidated under the caption *Harry Lewis, et al.* v. *Teleprompter Corporation, et al.* with other similar actions, without prejudice, however, to any order that Judge Owen might make in the proceedings then pending before him (JA 605-610). The consolidated action, from which the proceedings before Judge Owen were excluded, proceeded before Hon. Lloyd F. MacMahon, U.S.D.J., and is presently before Hon. Vincent L. Broderick, U.S.D.J. Touche Ross remains a defendant in the consolidated action.

** Appellants' main brief is referred to as "AMB" and their supplementary brief as "ASB."

lants frequently state that matters are "conceded" or "uncontroverted", most such matters were in fact not only contested but appellants' statements are contrary to fact. The boldness with which statements are made which are not supported by, or which are directly contradicted by, the record, is striking. The facts are these:

A. Events Preceding Touche Ross' Application to the District Court

1. November 1, 1973 through August 16, 1974—plaintiffs inexcusably fail to respond to Touche Ross' interrogatories outstanding for 9½ months

This action was begun on September 26, 1973 (JA A15). On November 1, 1973, Touche Ross addressed simple interrogatories to the plaintiffs inquiring primarily with respect to their stockholdings, and those of IIPL's members, in Teleprompter (JA 378-382). No answers having been received, Hon. Thomas P. Griesa, U.S.D.J., to whom the case was then assigned, orally directed on December 11, 1973 that answers be served so that they would be available for any motion to dismiss after the amended complaint was served (JA 398-399).* Although Touche Ross sought these answers, and stated that it wished to use the answers in connection with a motion to dismiss the amended complaint, the answers were not forthcoming (JA 395-400). Mr. Bader agreed to serve them by January 18, 1974 and then told the Court that he would serve them by February 1, 1974 (JA 398, 400). He stated that he needed the time to ascertain "full information" as to the stockholdings of the members of IIPL (JA 400). After the case had been reassigned to Hon. Richard Owen, he similarly directed that answers be promptly served, and such answers were to be served by February 5, 1974 (JA A27; 405, 438-439).

Although plaintiffs secured no extension of time, no answers were received until July 15, 1974, when a purported set of answers dated July 11, 1974 was received

* By order dated December 11, 1973, Judge Griesa dismissed the original complaint for legal insufficiency (JA 385). An amended complaint was filed on January 4, 1974 (JA A15; 386).

in the mail (JA 404, 422-429). The only answers served were those of IIPL (no answers being served by the individual plaintiffs) and IIPL's answers were manifestly insufficient and unresponsive (JA 402-415). Indeed, although Mr. Bader had told the Court that he needed until February 1974 to ascertain "full information" as to the stockholdings of the members of IIPL, the answers for the most part simply referred to the allegations of the amended complaint, did not give information required and stated that the information given was simply taken "from the files of the IIPL" (JA 404-415, 422-429).

2. August 16, 1974—Court orders plaintiffs to respond to Touche Ross' interrogatories within 20 days

On August 2, 1974, Touche Ross made a motion, pursuant to Rule 37(a), returnable August 16, for an order compelling answers by IIPL and each individual plaintiff "fully in writing under oath" (JA 402 *et seq.*). In response, Mr. Bader simply stated without explanation that he needed more time to supply the required information (JA 446-447).

On August 16, 1974, Judge Owen granted the motion in its entirety in open court with Mr. Bader present and directed that the further answers be served within 20 days —*i.e.*, by September 5, 1974; and filed his order on August 16 (JA 454, 572).*

* There is no merit to appellants' contentions that the Court erred in failing to give sufficient time or in requiring answers by the individual plaintiffs (AMB 17-19). As noted, the information sought was of the simplest kind and should have taken the briefest time to supply. The plaintiffs had had 9½ months to supply the information and had first been directed by the Court to supply the information about 8 months before but had failed to do so. Plaintiffs gave absolutely no reason why additional time should have been given (JA 446-447). They now refer to the "normal 30 day period" provided by Rule 33(a), but that refers to the time within which plaintiffs were required to serve answers after service of the interrogatories upon them, which 30 days had expired over 8 months before. As for the second point, the interrogatories were addressed to the "plaintiffs" and specifically called for answers not only from IIPL, but also "under oath and in writing, by each of the individual plaintiffs. . . ." (JA 378).

There is also no merit to appellants' claim that September 9 was actually the last day. At the evidentiary hearing, Mr. Bader testified that he knew the last day for compliance was September 5 and that on September 9 he was already four days late. See pp. 46-47, *infra.*

3. September 5, 1974—copies of purported answers mailed to conceal non-compliance with Court order

On Friday, September 6, 1974, under postmark of September 5, Touche Ross' counsel ("the Rosenman firm") received in the mail a copy of the purported answers of IIPL (JA A27; 229-296). The same day, in a separate enclosure, also under postmark of September 5, copies of purported answers of the individual plaintiffs, Randolph, Fagan and Michael, were also received (JA A27-28; 300-309).

All of these copies were unconformed, nothing appearing to indicate that they had been signed or sworn to by the plaintiffs, except for the written words "/s/ Merrill Sands" in the verification portion of the IIPL answers (JA 229-233). Merrill Sands ("Sands") was an officer of IIPL (JA 64). The copy of the answers of IIPL bore the typed date September 5, 1974 and the copies of the answers of Randolph, Fagan and Michael each bore the typed date August 29, 1974 (JA 232, 302, 305, 308). These last three plaintiffs lived in States other than New York: Randolph in California, Fagan in Connecticut and Michael in Vermont (JA 294, 300, 304, 307).

4. September 6 through September 10, 1974—Mr. Bader misleads Touche Ross' counsel as to existence of purported original answers

By letter mailed September 6 (supplemented by one mailed September 7) to Mr. Bader, the Rosenman firm requested that the originals of the several answers be immediately filed pursuant to Rule 6(c) of the General Rules of the District Court. The letters also noted the failure to conform the copies of the several answers and requested information regarding the same, including whether they had actually been signed and sworn to by the several plaintiffs (JA 340-342).

On Monday, September 9, 1974, at 9:15 A.M., a receptionist in the office of the Rosenman firm received a message from Mr. Bader for Lawrence R. Eno, Esq., the partner in charge of this matter, stating (JA 335-336, 537-538; A28):

> "Rec'd your letter about Teleprompter case. Will send you photo copies of original Interrogatory answers within next few days."*

Later on September 9, at 10:37 A.M., Mr. Bader unsuccessfully called Mr. Eno again; and it was reported to Mr. Eno that Mr. Bader could not be reached when Mr. Eno tried to return the call (JA 204-205, 353).

That same day, Mr. Eno advised Mr. Bader by hand-delivered letter that the telephone message was unsatisfactory, that an attorney from his firm was prepared to come immediately to Mr. Bader's office to inspect the originals, and if that was not permitted by the end of the day, or if the originals were not by then filed, it would be assumed that Mr. Bader did not have the originals, and did not have them on September 5, 1974 (JA 337-338).

In obvious response to that letter, at 9:25 A.M. on September 10, 1974, Mr. Eno's secretary received a message from Mr. Bader to the following effect (JA 339, 539-540; A29-30):

> "Mr. Bader called. Re Interrogatories. He will be sending photo copies of the original answers. He extends his apologies. He will extend your time to answer for 2½ or three weeks."**

At about 10:30 A.M., Mr. Eno called Mr. Bader and was told he was unavailable. After Mr. Eno had stated to Mr. Bader's secretary that the matter was urgent and that if he did not hear from Mr. Bader he intended to communicate with the Court, Mr. Bader called Mr. Eno at about 12:30 P.M. Mr. Eno told Mr. Bader he was not satisfied with the messages that he had been receiving and that he wanted to see the original answers of all the plaintiffs immediately. Mr. Bader said that Mr. Eno had a right to see them but that he was busy on a deposition and could not show them immediately, but would in a few days. Mr. Eno insisted on seeing them that day and told Mr. Bader

* The receptionist testified that this message was accurate and complete (JA 145-146).

** Mr. Eno's secretary testified that this message was accurate and complete (JA 147-148).

that he did not believe that Mr. Bader had the originals. Mr. Bader then stated, "I have them, you can take my word for it." Mr. Eno said that he wanted to see the originals, and that he or his associate, Mr. Nevling, would meet Mr. Bader in his office later that day after the deposition. Mr. Bader said that was not possible because he did not know where in his office the originals were and he might have left them at home. Mr. Eno said that he would then meet Mr. Bader in his office at 9:00 A.M. the next morning, to which Mr. Bader agreed (JA 207-209, 354).*

Mr. Eno by hand-delivered letter confirmed this agreement to exhibit the originals of the answers of Fagan, Michael, Randolph and IIPL (JA 346).

5. September 11, 1974—exposure of the deception as to two of the answers

Early on the morning of September 11, Mr. Nevling went to Mr. Bader's office where Mr. Bader showed him the original answers of IIPL. They were dated September 5, 1974, and purportedly were sworn to on September 5 by Merrill R. Sands, as Secretary of IIPL, in New York County. Mr. Bader appeared as the notary who took Sands' signature and the answers were also signed by Mr. Bader (JA 517). Mr. Bader's certificate of service stated that he had mailed copies to all attorneys on September 5, 1974 (JA 518).

Mr. Bader also exhibited the original answers of Randolph dated August 29, 1974 and purportedly sworn to on September 3, 1974 by Randolph in California; and the answers were also signed by Mr. Bader (JA 513-516). Mr. Bader's certificate of service stated that he had mailed copies to all attorneys except the Rosenman firm on September 10, 1974 (JA 516).

* As the District Court noted in its decision, Mr. Bader at the hearing at first denied having any recollection of this conversation, even though it had been previously detailed in letters to the Court and in affidavits (JA A31; 43-44, 348, 476, 569, 351-352). Indeed, it was referred to in a letter of Mr. Bader dated September 11, 1974 (JA 298). The Court found that the conversation occurred as stated (JA A30-31).

When Mr. Nevling asked for the answers of Fagan and Michael, Mr. Bader said that he could explain, and gave Mr. Nevling an affirmation dated September 11, 1974 which Mr. Bader had drawn to support a motion for extension of time to answer as to them. The affirmation merely stated that the answers of Fagan and Michael had not yet been received. No explanation as to how copies of those answers came to be mailed on September 5 was given in the affirmation or to Mr. Nevling (JA 196-197, 459-460).

The response of Mr. Bader to this exposure was to prepare discovery applications against Touche Ross—prepared he said in the early morning hours of September 11—with the threat that he would grant no time unless Touche Ross agreed to give him further time with respect to the interrogatories (JA 203, 584-590).*

B. The Application Below

1. Introduction

The foregoing events precipitated a series of letters, motions and evidentiary hearings before the Court. The District Court concluded from all the evidence that on September 5, 1974, Mr. Bader mailed the unconformed copies of the Fagan, Michael and Randolph answers to create the belief that they had been received by, and due and timely served on, September 5, the very last day for service under the order, whereas they had not been received by September 5 and due and timely service had not been made; and that there was "no credible evidence" that the IIPL answers had been timely executed and served (JA A39-41).

The District Court further found that the various, varying, changing and inconsistent explanations given by Mr. Bader with the assistance of Sands, the official of IIPL, were a "concocted story"; and that they both "made false statements and gave false testimony pursuant to an evolving plan to first deceive counsel and later the Court as to

* Although appellants appear to indicate (AMB 8) that Touche Ross was somehow in default in making discovery, the fact is that plaintiffs' discovery had been stayed by Judge Griesa and Judge Owen pending receipt of the answers to Touche Ross' interrogatories (JA 397, 582).

the circumstances surrounding the mailing of the purported 'answers' to interrogatories . . . on September 5, 1974" (JA A39-40).

It is not possible within the confines of this brief to detail all of the many inconsistencies and circumstances contrary to human experience which branded as false the stories told by Mr. Bader and Sands. We shall, however, detail enough of the evidence to demonstrate beyond dispute that not only is the District Court's conclusion supported by the evidence but it is compelled by the evidence.

2. September 11, 1974—the first "explanation" offered by Mr. Bader

Immediately after Mr. Nevling's visit to Mr. Bader's office, the Rosenman firm on September 11, 1974 hand-delivered a letter to the Court and to Mr. Bader setting forth the gist of the circumstances that have been described (JA 347-349). In response, Mr. Bader that same day sent a letter to the Court (JA 297-299). In that letter, Mr. Bader made the following statements, subsequently shown to be untrue:

1. That on September 5, he had Sands sign the IIPL answers; that he instructed his secretary to send copies of those answers to all defendants; and that he inspected those copies before they went out and they were "properly conformed."*

2. That in the afternoon of September 5, he "had to leave the office for St. Louis, Missouri"; that before he left the office he "prepared" copies of the answers which he intended to conform and mail when he returned from St. Louis; that by "inadvertence" on September 5 "apparently" a set of the unconformed answers had been sent to the Rosenman firm [nothing being said as to who had "inadvertently" sent the copies]; and that on September 5 he was told during his absence from the office that the "answers to the interrogatories by Randolph had arrived"

* The copies of the IIPL answers that were sent out were not "properly conformed" (p. 6, *supra;* JA 232-233).

[nothing being said as to who had conveyed this information].

3. That on September 9, while he was again out of the office, he was told [by someone not identified] about the receipt of Mr. Eno's letter of September 6, but he did not know its contents; and believing the letter referred to the answers of Randolph, Fagan and Michael, he called Mr. Eno's office on September 9 and left a message that he "hoped to receive the signed copies of those interrogatories and would be mailing them in a few days," and called again on September 10 leaving a message that he "hoped to receive the signed copies of the original documents in a few days."*

4. That it was not until 6:00 P.M. on September 10, 1974 that he found out what had occurred.**

The Rosenman firm received that letter on September 13 and responded by letter to the Court, showing that various statements in Mr. Bader's letter were incorrect and inconsistent with what had actually taken place (JA 351-352). Also on September 13, an order to show cause was signed bringing on Touche Ross' motion pursuant to Rule 37(b) and (d) (JA 470-471).

In response to that motion, Sands executed an affidavit dated September 17, 1974 in which he stated that he was the one who had by "inadvertence" mailed the unconformed copies of the Randolph, Fagan and Michael answers "upon my visit to Mr. Bader's office late in the day of September 5th, 1974"; that prior to mailing them he had seen Randolph's answers "which had arrived late in the day at Mr. Bader's office and I then assumed that I could send out the copies thereof" (JA 548-549).

* These were not, of course, the messages that Mr. Bader had left, which on both occasions were to the effect that he would be sending "*photo copies* of *original* answers" (emphasis added), showing that he knew that questions had been raised as to the originals of the answers, as he also clearly demonstrated he knew in his conversation with Mr. Eno at about 12:30 P.M. on September 10, 1974 (pp. 6-8, *supra*).

** This statement was inconsistent with Mr. Bader's conversation with Mr. Eno at 12:30 P.M. on September 10, 1974 (pp. 7-8, *supra*).

3. September 20, 1974—the second "explanation" offered by Mr. Bader

On September 20, 1974, Judge Owen heard argument on Touche Ross' motion to dismiss and on plaintiffs' motion for an extension of time with respect to the answers of Fagan and Michael (JA 210). On the argument of the motions, Mr. Bader, as the Court found (JA A35-36), made the following statements to the Court (JA 210-212):

(1) That he left his office on September 5 at about 3:00 P.M.; (2) that Sands was with him when he left the office, and he told Sands that if the answers of the other plaintiffs came in, Sands should mail out the copies; (3) that after he, Mr. Bader, left the office, Randolph's answers came in and that Sands had inadvertently mailed out copies of all the answers instead of just Randolph's; (4) that Randolph's answers had arrived in the 3:00 o'clock mail on September 5; (5) that he did not recall when he first learned that the unconformed copies had been sent, but he knew that when he spoke with Mr. Eno on September 10 (which was about 12:30 P.M.).*

4. The District Court orders a hearing

At the conclusion of the argument, the Court refused to grant the motion for an extension of time with respect to Fagan and Michael,** and thereafter ordered a hearing

* No reporter was present when these remarks were made. They were recorded in a memorandum prepared by Mr. Eno immediately after the argument (JA 355-356), were testified to by Mr. Eno at the hearing (JA 210-212), and were supported by the Court's notes of the argument which stated: "Bader said to Sands on Sept. 5: 'If *answers* come in want you to send answers out.'" (JA 219, 358).

At the hearing, Mr. Bader stated that he could not recall his statements on September 20 but if he did make those shown they were incorrect; and that his subsequent checking with Sands showed they were incorrect (JA 58-60, 218-222). He had, of course, checked with Sands prior to September 20 (JA 548-549). It was in this connection that Judge Owen handed over his notes out of a spirit of fairness to give Mr. Bader a chance to explain (JA 218-220).

** This motion was not made until September 11, after the time for compliance with the Court order had expired (JA 458). No

(footnote continued on next page)

into the circumstances relating to the service of the copy of Randolph's purported answers on September 5, 1974 at which the Rosenman firm requested the appearances of Sands and Mr. Bader's secretary (JA 592).

5. Mr. Bader's efforts to avoid a hearing

Mr. Bader then engaged in efforts to avoid the hearing. On October 9, he wrote a letter to Judge Owen (JA 310-313) stating that Sands would not voluntarily appear at the hearing and that it would be necessary to obtain compulsory process to have him appear. He further stated that his secretary knew nothing of the matter.* He noted that he felt it "appropriate" to file a purported notice of voluntary dismissal under Rule 41(a)(1)(i) as to Randolph (JA 314-316) which he said "moots" the hearing. He further asked that, if the hearing were to go forward, it be postponed. Judge Owen thereafter set the hearing for November 4, 1974.

On October 12, Mr. Bader signed an affirmation that because of "irreconcilable differences" between himself and Sands, who, Mr. Bader said, had refused to follow his advice, a lawyer, Arthur Kass, Esq., had been substituted for Mr. Bader as attorney for IIPL (JA 597-600). On October 28, 1974, Mr. Kass proceeded to file a purported notice of

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reason was given for not moving prior to September 5 (JA 459-460). The motion could have been granted only for "cause" upon a showing that "the failure to act was the result of excusable neglect." Rule 6(b). No such showing was made. Nothing was presented on the motion to excuse Fagan's failure to file any answers or a belated tender on September 18 of Michael's answers with a verification date of September 16 (JA 459-460, 541-544, 548-551). The alleged unsubstantiated "difficulties" which appellants now claim were being experienced (p. 32 ftn., *infra*) were not even referred to on the motion. The Court clearly did not abuse its discretion. *Beaufort Concrete Co.* v. *Atlantic States Construction Co.*, 352 F. 2d 460 (5th Cir. 1965), *cert. den.*, . . U.S. 1004 (1966); see *Pasquale* v. *Finch*, 418 F. 2d 627, 630 (1st Cir. 1969).

* Mr. Bader later filed an affidavit of his secretary, Mrs. Blacker, in a further effort not to have her appear (JA 603-604), and she did not appear at the first day's hearings where Mr. Bader testified that she knew nothing of the matter (JA 4). The Court thereafter suggested that it would be appropriate for her to appear, and she did so (JA 94-95, 98).

voluntary dismissal on behalf of IIPL, and also on behalf of Fagan and Michael (JA 602). Mr. Kass, although served with copies of all papers, was never heard from again and Mr. Bader continued to appear for IIPL (JA 1, 3-4).

6. The hearing before the District Court

The hearing commenced before Judge Owen on November 4 and continued on November 13 and 14, 1974 (JA 1 *et seq.*).

Sands appeared voluntarily at the hearing, despite Mr. Bader's prior claim that he would not do so and despite the "irreconcilable differences" that Mr. Bader claimed existed between them (see JA A35 ftn. 9). Although initially Mr. Bader tried to indicate that he did not know too much about Sands (JA 5-6), facts were developed that indicated that Sands lived in Brookfield Center, Connecticut, where it appeared Mr. Bader (who has an apartment in Scarsdale) had his legal residence; and on the third day of the hearings it appeared that Sands was Mr. Bader's brother-in-law (JA 149, 156, 166).

a. Mr. Bader's secretary disputes the first "explanation"

It appeared that Mr. Bader's secretary, Mrs. Blacker, worked Tuesdays, Wednesdays and Thursdays from approximately 10:30 A.M. to 3:30 P.M. (JA 603-604). She also testified that she had never seen Sands in Mr. Bader's office on Thursday, September 5, and, in fact, had never seen him in her life (JA 121-122, 123-124). It further appeared, contrary to the statement in Mr. Bader's letter of September 11 (p. 10, *supra*), that Mrs. Blacker had never mailed copies of any interrogatories on September 5 (JA 112, 8-9, 10).

b. The third "explanation" offered by Mr. Bader which is disputed by his secretary's testimony

Faced with Mrs. Blacker's testimony that she had not mailed any copies of answers on September 5 and that neither that day, nor at any other time, had she seen Sands, Mr. Bader and Sands presented the following story:

On September 5, Sands had come to Mr. Bader's office at about 8:30 A.M., requiring Sands to leave his home in Brookfield Center, Connecticut at about 6:30-6:45 A.M. (JA 66-67). Sands signed the IIPL answers, Mr. Bader acted as the notary, and Sands then took and mailed the copies of those answers (JA 6-8, 68-70). Sands left the office at or before 9:30 A.M. (JA 70, 8), before Mrs. Blacker arrived (JA 8).

There was no explanation as to why Sands had come to Mr. Bader's office that early, or why he had left that early —except to avoid Mrs. Blacker. Sands had no pressing engagements in New York: he testified that he had no appointments to meet (JA 71). After leaving Mr. Bader's office, his testimony was in effect that he drifted rather aimlessly about the City, making a number of telephone calls, dropping into a brokerage office to watch the ticker, wandering through the fur district (JA 70-71). He could not recall anyone he met whom he knew (JA 71-72). Finally, Sands came up with the name of a person he met, one Sol Sturman, but he had forgotten that just previously he had testified that when he went to call on Sturman, he wasn't there (JA 72, 70).

As already noted, the IIPL answers bore the date September 5, 1974. Mrs. Blacker testified that she dated papers the day she typed them and she recalled no instructions otherwise as to the IIPL answers (JA 140-141).* The District Court concluded that the IIPL answers were typed on

* In purportedly quoting from the testimony of Mrs. Blacker (AMB 42), appellants have put the back to the front, the front to the back, have omitted the middle and interpolated material (JA 140-141). For example, they quote her answer to the question whether she customarily put on a paper she typed a date on which she was not typing it, as: "Very, very rarely". Her answer in fact was: "Very, very rarely. I wouldn't do a thing like that. I mean, no, no. . . . You date it on the day you are typing it" (JA 140). This illustrates the complete unreliability of appellants' briefs.

After Mrs. Blacker testified, Mr. Bader said that his "best recollection" was that he asked Mrs. Blacker to type the IIPL answers on September 4 and to date them September 5 because he expected Mr. Sands in his office on September 5 to sign them (JA 194). The District Court rejected Mr. Bader's "best recollection" (JA A41).

September 5 in the period between 10:20 A.M. (when Mrs. Blacker said she arrived in the office) and about 3:15 P.M. (shortly before Mrs. Blacker left) (JA A41; 119, 15). This being so, the IIPL answers could not have been signed and notarized before 9:30 A.M. as claimed by Mr. Bader and Sands (JA A41). Indeed, if those answers were signed by Sands and notarized by Mr. Bader on September 5, that must have occurred after Mrs. Blacker left at about 3:30 P.M. since Mrs. Blacker never saw Sands. Mr. Bader must then have been in his office at that time, which he denied (JA 11, 18).

c. Post Office evidence disputes the second "explanation"

The story told by Mr. Bader and Sands continues:

Before Sands left Mr. Bader's office at about 9:30 A.M. on September 5, Mr. Bader showed Sands an open envelope on his desk, and said that it contained copies of the answers that had to go out that day but could not until the answers arrived (JA 68). Mr. Bader told Sands that he had to go to St. Louis and asked Sands to return to the office about 4:00 P.M. to see if the answers had come in, saying that he would call Sands after 4:00 P.M. (JA 15-16, 68-69).

But Mr. Bader had to retreat from the 3:00 P.M. departure time from his office that he had given to the Court on the argument on September 20 (p. 12, *supra*). Before the hearings commenced, Mr. Bader received from the Post Office, and had sent to the Court, a letter dated October 16, 1974 stating that the last mail delivery for his office was scheduled for 1:15 P.M. to 2:30 P.M. (JA 226-227, 60).* Faced with this letter, Mr. Bader now testified that he could not say when he left his office any closer than sometime between 12:00 noon and 2:00 P.M. (JA 11). Testimony of a Post Office official at the hearings subsequently showed that the last mail delivery to Mr. Bader's office on September 5 took place between 1:30 P.M. and 1:45 P.M. (JA A36; 93-94).

* The 2:30 P.M. time was shown to be actually the time the mail carriers quit their jobs at the Post Office for the day and the last delivery is made prior to that time (JA 89-91).

Mr. Bader testified that when he left the office, the answers had still not come in (JA 12). Since it could be established that he had not gone to St. Louis at all on September 5, Mr. Bader now testified that he did not go from his office to St. Louis but rather went to the New York Law Institute where he stayed until about 7:00 P.M. (JA 17-18).

Meanwhile, according to Sands, after wandering about town, he returned to Mr. Bader's office at about 3:45 P.M. (just in time to miss Mrs. Blacker); he went through the mail in the front office and found Randolph's letter from California; went into Mr. Bader's room, opened the envelope, threw the envelope into the wastebasket without noticing the postmark, and waited for Mr. Bader's call (JA 71, 73-76).

At about 4:15 P.M., Mr. Bader called Sands at Mr. Bader's office. Sands said ". . . you don't have to worry, the Teleprompter answers are here." Mr. Bader said "fine, good." Sands said "go, have a good trip now." Mr. Bader said, "good." That was the entire conversation (JA 76, 18-19).

Both Mr. Bader and Sands testified that Mr. Bader gave Sands no instructions and did not then or earlier in the day tell Sands to mail the unconformed copies (JA 19-21, 15, 78-79, 177).* Nevertheless, immediately after the phone call, Sands, without looking in the envelope that was on Mr. Bader's desk to see what was in it and without knowing what copies of answers were in it, sealed the open envelope and mailed it at about 4:20 P.M. (JA 77-78, 84).

Mr. Bader testified that he left the New York Law Institute to catch an 8:05 P.M. plane from Newark to St. Louis; but he missed the plane, returned to New York and went to his home in Scarsdale (JA 152-154).

The District Court rejected this story in its entirety (JA A39). With respect to the story, the following may be noted:

* This is contrary to what Mr. Bader had told the Court on September 20, when he said that Sands was with him when he left the office at 3:00 P.M. and that he told Sands to mail out the copies if the other answers came in (p. 12, *supra*).

1. Nothing was offered to explain why Mr. Bader asked Sands to return to the office at 4:00 P.M. to see whether the answers had come in. Mr. Bader said he wanted to know so that if the answers did not come in, he could make a motion for an extension of time on Monday, September 9,* when he expected to return to his office (JA 16). Since he did not expect to make the motion before September 9, and since he expected to be in the office on September 9, when he would know in any event whether the answers had come in, Mr. Bader could not explain the reason for his having Sands return to check the mail (JA 16-17).

2. Mr. Bader testified that he knew that September 5 was the last day to serve the answers and he was concerned about that—so concerned that he had had Sands hang around the City all day just to see if the answers had arrived (JA 12, 21, 176). He also testified that after his phone call with Sands he believed that the answers of all individual plaintiffs had arrived and he did not know that the copies had been mailed (JA 181, 34, 37). Nevertheless, not only did he not return to his office from the New York Law Institute, which was only twenty minutes from his office (JA 21), to examine the answers and to effect proper service, but he did not return to his office after he allegedly missed his plane to St. Louis. According to Mr. Bader, when he missed the plane, he returned to New York and arrived at Grand Central (JA 153). He arrived at about 9:30 P.M. (JA 616). Grand Central was but a few blocks from his office at 274 Madison Avenue (between 39th and 40th Streets) (JA 627). There was still time for him to go to his office from Grand Central and mail the copies before midnight. Yet Mr. Bader did not go to his office at all but went home from Grand Central (JA 153-154). The inference from his own testimony is unmistakable that Mr. Bader knew on September 5 that the copies had been mailed.

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* Several days after the time for service of the answers had expired.

3. Although September 5 was the last day for service of the answers and Mr. Bader was concerned about that, he testified that he never asked his secretary to look for the signed answers in the mail (even though she left the office long after the last mail delivery) and he gave her no instructions about the unconformed copies (JA 15-16, 18, 12-13).* Further, even though it developed at the hearing that Mr. Bader had a partner in the office, a Mr. Scher, and even though Mr. Scher had a full-time secretary, Mr. Bader testified that he never asked either of them to check his mail the afternoon of September 5 (JA 104-105, 151-152, 619). Instead, he had Sands hang around the City all day on September 5 in order to check Mr. Bader's mail.

4. The conversation between Mr. Bader and Sands at about 4:15 P.M. on September 5 was to the effect that the "Teleprompter answers" had arrived (JA 19, 76). Mr. Bader was expecting three answers: one from California, one from Vermont and one from Connecticut (JA 303, 306, 309). Yet he did not ask Sands which answers had come in and Sands did not tell him (JA 19-20). Mr. Bader's only explanation for not asking was that he was "very rushed at the time" (JA 19). At the time, of course, he was allegedly in the New York Law Institute where he allegedly remained until about 7:00 P.M. (JA 17-18).** And on the basis of that conversation, Mr. Bader concluded that all three answers had coincidentally arrived at the same time from three separate individuals mailing from three widely separated parts of the country (JA 181).†

* His explanation for not doing so (given after he had testified as to the time when he had left his office) was that despite the Post Office letter of October 16, 1974, the last mail to his office was not normally delivered until about 3:30 P.M. (JA 15-16), at about the time his secretary left the office; but this was contradicted not only by the Post Office letter but also by the subsequent Post Office testimony of delivery between 1:30 P.M. and 1:45 P. M. (p. 16, *supra*).

** Nor did Mr. Bader ask Sands what answers had come in when he subsequently saw him on September 8, when Mr. Bader was not rushed (p. 20, *infra*).

† In his letter of September 11 to the Court (pp. 10-11, *supra*), Mr. Bader had said that on September 5 he was told that Randolph's

(footnote continued on next page)

5. As the District Court found (JA A37-39), the entire story defies belief: that Sands, the client, although he could in his phone talk have asked Mr. Bader what to do about the copies in the open envelope on the desk, nevertheless, immediately after hanging up the phone, took it upon himself, with no instructions from Mr. Bader, to seal and mail the envelope.*

The story told by Mr. Bader and Sands continues:

Mr. Bader testified that he went to St. Louis on September 6, returning the night of September 7, and while in St. Louis he learned that he had to be in Washington, D.C. on Monday, September 9 (JA 154-155, 171). On September 8, he visited Sands in Brookfield Center, Connecticut (JA 156). They did not discuss the answers and Sands did not tell Mr. Bader that he had mailed out the copies of the answers (JA 48, 79-81, 181).

Instead, Mr. Bader asked Sands to go to his office in New York on September 9 to check his mail because he had not been there the afternoon of September 5, or on Friday (September 6) or Saturday, and was not going to be there Monday; just to stop in and read him the return addresses on the envelopes (JA 27-28, 157). He asked

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answers [not the "Teleprompter answers"] had arrived, and that on September 9 and 10 he told the Rosenman office that he "hoped to receive the signed copies of those interrogatories and would be mailing them in a few days" and that he "hoped to receive the signed copies of the original documents in a few days." These statements were obviously made to lead the Court to believe that on September 9 Mr. Bader was under the impression that all the answers had *not* arrived and that he was expecting them in a few days; and that that was what he had told the Rosenman firm on September 9 and 10. Those statements could not stand when the subsequent proof showed the actual messages left at the Rosenman firm and Mr. Bader's conversation with Mr. Eno on September 10 when he claimed to have the originals of all the answers. So Mr. Bader simply turned the story around to state that on September 5 he believed all the answers had arrived and he did not find out the contrary until the evening of September 10 (JA 181). The present astonishing statement in appellants' brief that on September 9 and 10 Mr. Bader informed the Rosenman firm that "he was going to be late" (AMB 14) is simply contrary to fact.

* *Cf.* Mr. Bader's statements to the Court on September 20 (p. 12, *supra*).

Sands to get to the office as close to 9:00 A.M. as possible, and he gave Sands a key to the office (JA 157-158, 28).

Mr. Bader testified that on Monday, he took an 11:00 A.M. flight from La Guardia to make a 1:30 P.M. appointment in Washington, D.C. (JA 28-29). He called Sands at about 9:00 A.M. from the airport (JA 28-29). Sands was in Mr. Bader's office and told him that Mr. Eno had written him "a letter" (JA 26-27). Sands did not open the letter or tell Mr. Bader what was in the letter and Mr. Bader did not ask him to open the letter and to see what was in it (JA 32-33). Mr. Bader said that he assumed that Mr. Eno was complaining that he had not gotten copies of the Randolph, Fagan and Michael answers (JA 27, 37-38). Mr. Bader testified that he then called Mr. Eno's office and left a message that he would be sending copies in a few days (JA 33-35).

Mr. Bader said that he returned from Washington, D.C., on September 10 on the 7:00 A.M. shuttle; went directly to a deposition for which he was very late; and made his 9:25 A.M. call to Mr. Eno's office simply because he had not spoken personally to Mr. Eno on September 9, and left the same message as he had the day before (JA 30-31, 35, 173-174).

Mr. Bader got back to his office at about 6:00 P.M. on September 10 (JA 25); found Mr. Eno's letters of September 6, 7, 9 and 10 all unopened (JA 49, 179); found Randolph's answers but not Fagan's or Michael's (JA 37); found that the envelope to the Rosenman firm with the unconformed copies was missing; and for the first time realized that unconformed copies had been mailed to the Rosenman firm (JA 36-37, 48-49).

This contrived story* was the best invention possible to account for the statements in Mr. Bader's letter of September 11 to the Court that on September 9, Mr. Bader, while out of the office, had heard about Mr. Eno's letter of September 6 but did not know its contents; that he as-

* Refuted on its face by, among other things, the actual messages left with the Rosenman firm on September 9 and 10, and Mr. Bader's conversation with Mr. Eno at about 12:30 P.M. on September 10 (pp. 6-8, *supra*).

sumed that Mr. Eno was complaining, not that he had received unconformed copies, but that he had not received *any* copies, of the answers of the individual plaintiffs; and that the messages that Mr. Bader had left on September 9 and 10 were that he "hoped to receive the signed copies of those interrogatories and would be mailing them in a few days" and that he "hoped to receive the signed copies of the original documents in a few days."*

There are several matters to be noted about this portion of the "concocted story":

1. Although Mr. Bader testified that he knew that he already was late in service of the answers under the Court's order, that he thought that all the originals were in his office, and that he was anxious about the mail that might have in the interval been received in his office, he did not, when he arrived in Newark from Washington on September 7 at about 10:00 P.M., go to his office, nor did he go to his office on September 8 (JA 12, 27, 155, 156, 189). Instead, on September 7 he went to his home in Scarsdale and on September 8 he went to visit Sands.** Here again the conclusion is inescapable that Mr. Bader knew that the unconformed copies of the answers had been mailed.

2. It is inconceivable, if Randolph's answers had arrived on September 5 and if Sands, unbeknownst to Mr. Bader, had then mailed out the unconformed copies, that this would not have been the subject of some discussion between them on September 8.

3. There was no need for Sands to get up at dawn to come from Brookfield Center, Connecticut to be in Mr. Bader's office at 9:00 A.M. on September 9. According to his own testimony, Mr. Bader took an 11:00 A.M. plane from La Guardia. Assuming that Mr. Bader took that and not a later plane, he could have come to his office at or before 9:00 A.M. (as Sands allegedly did) and still have

* See third footnote, p. 19-20, *supra*.

** Appellants argue incorrectly (pp. 46-47, *infra*) that Mr. Bader had until September 9 to serve the answers. If that were so, why, knowing he was not going to be in his office on September 9, did he not go to his office the night of September 7 or on September 8?

had ample time to catch his 11:00 A.M. plane.* And, as already noted (p. 19, *supra*), there were other people in Mr. Bader's office who could have read to him the return addresses on the envelopes.

4. The idea that Mr. Bader wanted Sands only to read him return addresses is likewise unbelievable. Mr. Bader said that he did not ask Sands to open the envelope from the Rosenman firm because he was "rushed to death" and did not think the letter could be urgent (JA 42-43). If he did not think the letter was urgent why did he then call Mr. Eno's office at 9:15 A.M.? And why did he repeat the call at 10:37 A.M. that day (JA 204-205, 353)? And why did he call Mr. Eno's office at 9:25 A.M. on September 10, a call which Mr. Bader said he made when he was dashing for a deposition and which he made simply because he had not reached Mr. Eno on September 9 (JA 31)? As for being "rushed to death," Mr. Bader's alleged talk with Sands on September 9 was at 9:00 A.M., *two hours* before Mr. Bader's plane left and he was already allegedly at the airport.

5. By September 9, two letters had arrived in Mr. Bader's office from Mr. Eno: one the letter of September 6 and the other the letter of September 7 (p. 6, *supra*). If Mr. Bader assumed from one letter that Mr. Eno was complaining about not being served with any copies, to what did Mr. Bader assume the other letter referred?

Mr. Bader's story continues:

He testified that it caused him "very great concern" when at about 6:00 P.M. on September 10 he realized what had happened (JA 51-52). He said that he did not know who had taken the copies from his desk and mailed them: it could have been Mrs. Blacker, Sands, Mr. Scher, Scher's secretary or a number of people (JA 50).

Although Mr. Bader testified that he thought Sands might have mailed the copies (JA 50) and although Sands

* As shown below, Mr. Bader could have made his 9:15 A.M. call to the Rosenman firm from his office; gone to La Guardia; made his 10:37 A.M. call to the Rosenman firm from La Guardia; and still have caught his 11:00 A.M. plane (JA 626-627).

was the most logical, and the first, person to ask, Mr. Bader never asked him whether he had mailed the copies. If Mr. Bader's story were genuine, he would have been on the telephone to Sands the evening of September 10—the moment he allegedly first discovered what had happened. Sands testified that although he spoke to Mr. Bader after September 10 and before September 15, and although Mr. Bader was telling him that he had "big problems" in the case (JA 80-81, 82), it was not until Sunday, September 15, that Sands asked what had happened. Mr. Bader replied that he had told his secretary that she must have mailed the copies without telling him and she had denied it, at which point Sands volunteered that he had mailed them (JA 81).

As for Mrs. Blacker, Mr. Bader said that he did not try to get in touch with her on September 10 because not only did he not have her phone number, but he did not have her address: it was nowhere in his office and he did not put it on her withholding forms (JA 52, 53-54). Mrs. Blacker contradicted this, testifying that Mr. Bader did have her address (though not her phone number) and it did appear on her withholding statements (JA 100). Mr. Bader said that he was out of the office on September 11 but called Mrs. Blacker on the phone that day to tell her she had gotten him into "one hell of a lot of hot water" (JA 54), and that the next day he "sure did have" a conversation with her (JA 50). Mrs. Blacker testified that she did not shortly after September 5 have any conversation with Mr. Bader about what had occurred that day although he had "recently" asked her if she remembered where he had been that day (JA 120), that Mr. Bader never said to her that she had gotten him into hot water (JA 126), and that when he did speak to her it was simply to ask her whether she had mailed the copies (JA 125-126). The District Court found that this was " 'window dressing' for the court hearing that was foreshadowed" (JA A39).

7. The District Court's conclusion

On the basis of all of this evidence the conclusion of the District Court was inescapable: that on September 5, unconformed copies of answers had been mailed by Mr.

Bader to create the impression that he had the originals and that due and timely service was being made;* that he thereafter sought to lead the Rosenman firm to believe that was in fact the case; and that when finally compelled, under threat of Court action, to reveal that he did not have all the originals, he and his client IIPL, through Sands, collaborated to create a "concocted story" and "made false statements and gave false testimony pursuant to an evolving plan to first deceive counsel and later the Court as to the circumstances . . ." (JA A39-40).

The Court found that the answers of Fagan and Michael had concededly not been received by September 5, 1974 (JA A40). The Court also found that the answers of Randolph had not been received on that day and that there was "no credible evidence" that the IIPL answers had been timely executed and served (JA A40-41).

With respect to the Randolph answers, although Randolph submitted an affidavit almost two months after the hearings closed to the effect that he had mailed his answers in California on September 3, 1974 (JA 623-624; see p. 36, *infra*), the Court properly concluded from all the evidence that they had not arrived by September 5 and, had they done so, they would have been delivered no later than about 1:45 P.M. and Mr. Bader would, before allegedly departing from the office, have seen the answers which he claimed he was anxiously awaiting.

* On this appeal for the first time, appellants, on the basis of two cases, seek to justify the sending of the unconformed copies on the extraordinary ground that it is "a practice in this Court" to send such unconformed copies when the originals are not on hand to permit compliance with a Court order (ASB 3-4). There is no such "practice." The Rules recognize that an original must be on hand before a copy is served: for they provide for the filing of an original either *before service* or promptly thereafter [Rule 5(d)], and under the District Court's General Rule 6(c) interrogatory answers must be filed no later than 2 days after service. The case cited where an unsigned unverified answer was sent, *Cabales* v. *United States*, 51 F.R.D. 498 (S.D.N.Y. 1970), *aff'd*, 447 F.2d 1358 (2d Cir. 1971) is contrary to appellants' position, for there the Court held that such an answer "does not qualify as an answer" and the sanction of deeming the answer to be contrary to plaintiff's claims (resulting in dismissal) was imposed. The other case cited, *Jones* v. *Goldstein*, 41 F.R.D. 271 (D. Md. 1966), has no relevance to the point.

As for the IIPL answers, although the mailed copy bore the writing "/s/ Merrill Sands", but with no indication that it had been notarized, accepting as the District Court did the testimony of Mrs. Blacker, those answers could not have been signed by Sands and notarized by Mr. Bader before 9:30 A.M. on September 5; and if they had been signed and notarized that day, that could only have occurred after Mrs. Blacker left the office at about 3:30 P.M. However, Mr. Bader and Sands denied that Mr. Bader was in his office at such time. Further, Mr. Bader claimed that on September 5 he both notarized the IIPL answers and inspected the mailed copies to be certain they were "properly conformed" (JA 298). Both claims are belied by the facts that Mr. Bader could not even identify the handwriting of the words "/s/ Merrill Sands" on the copy mailed September 5 (JA 167-168) and said copy was not "properly conformed" and showed no notarization, no date of notarization, no writing in the spaces for Mr. Bader's signature, nor any other indication of participation by Mr. Bader (JA 232-233, 168-169).* In view of the varying, inconsistent and contradictory stories told by Mr. Bader and Sands, the Court's conclusion that there was "no credible evidence" as to when the IIPL answers were signed and notarized, was entirely correct.

Appellants repeatedly assert (AMB *e.g.*, 35-36, 47, 52) that it is "conceded" that the information contained in the unconformed copies of answers mailed on September 5 "was in all respects correct." Not only was such not conceded, but it is contrary to fact. Touche Ross' motion to dismiss was predicated not only on the circumstances

* While not directly relevant to the basis for the District Court's decision, it is noteworthy that Mr. Bader, for the first time in his brief to this Court, claims that the words "/s/ Merrill Sands" were in Sands' handwriting (AMB 22-23). Not only was no evidence to support this contention brought to the District Court's attention, either at or after the hearing or in Mr. Bader's post-decision motion of October 1976 on the basis of new evidence (pp. 27-29, *infra*), and not only did Mr. Bader, when testifying, state that he could not recognize who wrote the name (which was that of his brother-in-law) but in his post-hearing memorandum (p. 23) he implied that the handwriting was his secretary's. Record on Appeal, "Memorandum in Opposition to Rule 37 Motion Made by Touche Ross & Company," following Item 379.

stated above, but also on the ground of the manifest insufficiency of the answers of Randolph and IIPL and their failure in such respects to comply with the order of August 16, 1974 (JA 477-486). It was demonstrated in detail that Randolph's answers were not only incomplete but entirely worthless—for example, he claimed to have sold substantially more Teleprompter stock than he claimed to have owned (JA 482-486). In these "stop-gap" answers, Randolph indicated that he was guessing as to his stockholdings (JA 515). On that motion, plaintiffs *admitted* that Randolph's purported answers were incorrect (JA 550, 544).* As for IIPL, although Mr. Bader had had over 10 months to gather the "full information" from its members that he told the Court he would secure (p. 4, *supra*), IIPL had failed to supply such information and had simply ignored the requirements of the order of August 16, 1974—and such deficiencies were patent (JA 478-481). IIPL sought to justify the deficiencies on the ground that the information was all that it had in its records (JA 550). IIPL admittedly had still not gathered the required information from its members (JA 550, 575-576). It was never conceded that any of the information in any of the purported answers was correct.

C. The Subsequent Claim of New Evidence

After the entry of Judge Owen's order of January 9, 1976, and the dismissal on September 17, 1976 of the appeal therefrom, plaintiffs moved in October 1976 (JA 773 *et seq.*) to vacate the order of January 9, 1976 on the ground of alleged new evidence (which, however, in fact merely confirmed the correctness of that order, and which motion the Court accordingly denied [JA 906]).

1. The mailman's affidavit

Plaintiffs presented an affidavit dated February 10, 1976 of Vincent J. La Porta ("La Porta"). La Porta's affidavit confirmed that he was the mailman who made the last delivery of mail on September 5, 1974 to Mr. Bader's

* Appellants refer (AMB 34) to an information letter signed prior to August 29 by Randolph. There is none in the record. The only letter from Randolph was one after the Rule 37(b) motion had been made which showed that his purported answers were entirely incorrect (JA 553, 550, 544).

office (see JA 343) and stated that he left the mail, according to his normal practice, with the secretary in the office who sat at the front desk and who was the office receptionist (JA 671).

The affidavit said nothing as to the time of day the delivery was made (p. 16, *supra*) and thus did not challenge, or even deal with, the issue before Judge Owen. Despite this, appellants assert that the La Porta affidavit "indicates the reason for the time discrepancy between the claimed time of mail delivery by . . . [Mr. Bader] and the actual time of mail delivery as set forth by the postal records" (AMB 13). It, of course, does nothing of the kind.

Mr. Bader speculated that perhaps after the office receptionist (whom it was now claimed had poor eyesight) received the last mail delivery, she did not put it on his desk until later that day (JA 784). His point apparently was that perhaps the Randolph answers came in the last mail, before he allegedly left his office, but he did not see them for this reason. However, Mr. Bader prior to the hearing stated, and his secretary at the hearing testified, that the office mail was delivered at the front desk (JA 311, 103), as La Porta's affidavit confirmed.* Mr. Bader thus at all times knew—on September 5, 1974 and on the hearings before Judge Owen—that the mail had been handed by the mailman to the office receptionist, and he raised no question about that at the hearing. There was not a shred of evidence to support Mr. Bader's speculation; indeed, he now stated that he could not locate the office receptionist (JA 667).

2. The Fagan affidavit

The second item of new evidence was an affidavit of Fagan dated March 22, 1976 (JA 695-696). The gist of that affidavit was that about August 30, 1974, Fagan signed his answers and mailed them to Mr. Bader but somehow, mysteriously, those answers were never received by Mr. Bader; that about September 10, 1974 Mr. Bader sent a

* In a prior affidavit, Mr. Bader saw nothing unusual in his mail being left for him in the front office (JA 667), and elsewhere stated that the reason his secretary did not usually open his mail was because it was delivered so far away in the front office (JA 310-311).

letter to Fagan stating that the answers had not been received and asking for their return (JA 469) but somehow, mysteriously, that letter was never received by Fagan; and that somehow, in all the intervening time since September 1974, and despite the hearing before Judge Owen, Mr. Bader never found out that his client Fagan had mailed the answers and Fagan similarly never found out that the answers had not been received.*

Mr. Bader stated that he had ascertained only shortly before the March 22, 1976 affidavit that Fagan claimed to have signed his answers on August 30, 1974, and that he had not been in touch with Fagan in all the intervening time since the answers had not arrived because he believed that Fagan "was just not interested in this action any more" (JA 693, 806). This complete failure to even attempt further communication despite the pendency of the motion to dismiss is a vivid commentary on the nature of the conduct of this action and the complete disregard by the plaintiffs and their counsel of their responsibilities to the Court and their opponents.

On the basis of the Fagan affidavit, the appellants repeatedly assert that it is "uncontroverted" and "conceded" that Fagan signed his answers on August 30, 1974 (AMB *e.g.*, 13, 22, 35-36, 52).

Although it is plain that Fagan's affidavit is but a continuation of the "concocted story," even if one were to credit it, it simply further confirms that on September 5, 1974 Mr. Bader did not have Fagan's answers (and, indeed, had no knowledge of their status) when the unconformed copy of Fagan's answers was mailed to the Rosenman firm.**

* Appellants (AMB 11) suggest here for the first time that there was some change of address as to Fagan. This is contrary to the record (see JA 467, 728-730).

** Mr. Bader also filed answers of Fagan purportedly verified May 13, 1976 "Nunc Pro Tunc as of August 30, 1974" and signed by Mr. Bader "Nunc Pro Tunc as of August 29, 1974" (JA 728-730). We believe we need not further comment on purported answers served at least *20 months* after they were required to be served by the Court order and at least *4 months* after the action had been dismissed as to Touche Ross for failure to comply with such Court order.

ARGUMENT

POINT I

The sanctions imposed by the Court were proper and there was nothing disentitling Touche Ross to such sanctions.

A. The Sanctions Were Proper.

As stated by the Supreme Court in *National Hockey League* v. *Met. Hockey Club*, 427 U.S. 639, 642 (1976), the question here is not whether "this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing." In that case, the Supreme Court reversed the judgment of the Third Circuit Court of Appeals (531 F.2d 1188) which had in turn reversed an order dismissing, pursuant to Rule 37, an antitrust action for failure to timely answer interrogatories as ordered by the District Court. Contrary to appellants' claim here that it is improper to consider the record prior to the entry of the order of August 16, 1974 (AMB 32), the Supreme Court stated that the full record was to be considered in determining the sanctions to be imposed. 427 U.S. at 641-2. *Accord: Diapulse Corporation of America* v. *Curtis Publishing Co.*, 374 F. 2d 442, 447 (2d Cir. 1967).

Although the Supreme Court in the *National Hockey* case noted that the sanction of dismissal should ordinarily not be imposed "when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith or any fault . . .," and that the Court of Appeals there had found various "extenuating factors" which led it to believe that plaintiffs' conduct was not in bad faith, willful or intentional (427 U.S. at 640, 641), the Court held (427 U.S. at 642) that such factors "cannot be allowed to wholly supplant other and equally necessary considerations embodied in that Rule [37]." The Court went on to say (427 U.S. at 642-3):

> "There is a natural tendency on the part of reviewing courts, properly employing the benefit of hind-

sight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the District Court.

"But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other District Courts . . . ."

These observations are peculiarly applicable to this case. In the *National Hockey* case, real difficulties were experienced in securing information necessary to respond to massive interrogatories and there were a great number of genuine extenuating circumstances (see 531 F. 2d 1188) which nevertheless did not prevent dismissal. There are no "extenuating factors" here. These interrogatories were of the simplest kind. They had been outstanding since November 1, 1973. Directions by two Judges for service of the answers were ignored.* After it had been demonstrated on Touche Ross' Rule 37(a) motion in August 1974 that there had been a complete failure to gather the required information in the preceding many months and

* These orders, though oral, could not be ignored. *Henry* v. *Sneiders*, 490 F. 2d 315, 318 (9th Cir.), *cert. den.*, 419 U.S. 832 (1974).

when a last-moment effort to ward off dismissal failed to produce timely answers, the events described at length above took place. The failure to answer the interrogatories promptly was calculated and deliberate. In an affidavit dated September 17, 1974, Sands, the Secretary of IIPL, stated (and at the hearing testified, JA 65) that he was "controlling the strategy of this litigation"; and in seeking to explain what he called "the delay in answering the interrogatories," Sands stated that pending the conclusion of an investigation of Teleprompter by the SEC (which, he said, had "now" been concluded), he had "determined" that IIPL "should not go ahead with an active role in this action" (JA 548-549).

There was thus no "inability" to comply by a party "fostered neither by its own conduct nor by circumstances within its control." *Societe Internationale* v. *Rogers*, 357 U.S. 197, 211 (1958). No "inability to comply" was ever shown.* The sanction of dismissal as to Touche Ross was fully warranted. This sanction, indeed, was less severe than might appear, since the Court did not purport to affect plaintiffs' claims against other defendants and Touche Ross remains a defendant in the consolidated action to respond to the claims of other members of the class. The sanction was ordered only after the entry of an order pursuant to Rule 37(a) and the holding of an evidentiary hearing on the

* The alleged circumstances now adverted to by appellants (AMB 10-11) were never shown to have had any relationship to the failure to answer the interrogatories in the long time that they had been outstanding or after the order of August 16, 1974. The claim that Sands "was moving" from Connecticut to Florida is not only completely unsupported by, but is contrary to, the record—as late as November 1974 Sands testified that his only address was in Connecticut (JA 62). No "inability to comply" is shown by the claim that Mrs. Blacker was being dismissed and knew that when she testified (claimed for the first time after the order of January 9, 1976 when Mr. Bader said that for that reason she should be considered a hostile witness [JA 667]); the similarly belated claim that the receptionist had poor eyesight; the claim that Mr. Bader was having difficulties with his partner Scher; or claims of undefined "problems" in communication by mail in view of the failure to gather the required information in the 9½ months preceding the order or to use the telephone or other means of communication.

failure to comply with such order.* The findings show willfulness, bad faith and fault (JA A25-42).

Proceeding on the assumption that it is "conceded" that the information contained in the unconformed copies mailed on September 5, 1974 "was in all respects correct," appellants argue that there was no prejudice as the result of their failure to comply with the order and of their deceit.** The assumption is, of course, wholly incorrect and the answers reflected in the unconformed copies were entirely insufficient (pp. 26-27, *supra*). Nor does it follow that a party failing to comply with a Court order as a result of fault can avoid dismissal simply by later offering to do what the order directed him to do. *Kelley* v. *United States,* 338 F. 2d 328 (1st Cir. 1964); *Alevizopoulos* v. *Central American Agency,* 137 F. Supp. 689 (S.D.N.Y. 1955, Lumbard, J.). That, in fact, is the teaching of the *National Hockey* case. Indeed, in this case we have not only the willful conscious violation of a Court order under deceitful circumstances, but a record that shows a complete indifference from the start to appellants' responsibilities as litigants under the Rules of the Court. See *Alevizopoulos* v. *Central American Agency, supra.*

This Court has said, in discussing sanctions, that "the particular facts of the case must control. The question is one of discretion, ..." *Diapulse Corporation of America* v. *Curtis Publishing Co., supra; National Hockey League*

* Cases cited by appellants (AMB 31-32) where the Courts noted that before dismissal there had been no Rule 37(a) order or no evidentiary hearing are not applicable here. *Flaks* v. *Koegel,* 504 F. 2d 702 (2d Cir. 1974); *Securities & Exch. Comm'n* v. *Research Automation Corp.,* 521 F. 2d 585 (2d Cir. 1975); *Israel Aircraft Industries, Ltd.* v. *Standard Precision,* Nos. 76-7591 *et al.* (2d Cir. July 7, 1977); *GFI Computer Industries, Inc.* v. *Fry,* 476 F. 2d 1 (5th Cir. 1973); *Independent Productions Corp.* v. *Loew's Inc.,* 283 F. 2d 730 (2d Cir. 1960); *Fox* v. *Studebaker-Worthington, Inc.,* 516 F. 2d 989 (8th Cir. 1975). In *Grace* v. *Fisher,* 355 F. 2d 21 (2d Cir. 1966), where a Rule 37(a) order had been obtained, dismissal was upheld.

** Appellants state (ASB 3) that Touche Ross' "attorney admitted that no prejudice was involved in this case repeatedly." That is not true. The record references are to appellants' claims that there was no prejudice.

v. *Met. Hockey Club, supra.* The compelling facts in this case show that there was no abuse of discretion in dismissing as to Touche Ross and the language as to deterrence in the *National Hockey* case is peculiarly applicable here.

For some reason, appellants believe (ASB 1) that *Cabales* v. *United States, supra,* a seaman's case, assists them in this case. On the contrary, there, in a far less persuasive situation than exists here, this Court affirmed dismissal where unsigned unverified copies of answers had been served.*

With respect to Touche Ross' expenses, assessed against Mr. Bader and IIPL, which was "controlling" the action, Rule 37(b) expressly provides that, if a party shall fail to answer interrogatories, the court "shall" require the party or his attorney, or both, to pay reasonable expenses, including attorneys' fees, caused by the failure. The Advisory Committee Note of 1970 to Amended Rule 37 makes clear that the purpose of such provision is to ensure "that expenses should ordinarily be awarded unless a court finds that the losing party acted justifiably. . . ." and that the burden is on the losing party to show that the circumstances are such that expenses should not be awarded. 4A Moore's *Federal Practice* (2d ed.) ¶37.01[8], pp. 37-24 to 37-26; ¶37.03[2.7], p. 37-77.**

* *W. T. Grant* v. *Haines,* 531 F. 2d 671 (2d Cir. 1976), *Lefrak* v. *Arabian Am. Oil Co.,* 527 F. 2d 1136 (2d Cir. 1975), and *Korn* v. *Franchard Corporation,* 456 F. 2d 1206 (2d Cir. 1972), cited to show that the District Court improperly commented on Mr. Bader's conduct, are irrelevant since here the District Court made its findings on the basis of testimony in the course of a hearing before it to determine whether there had been compliance with its order.

** Courts have thus compelled the payment of expenses, including attorneys' fees, by parties and counsel: *e.g., United Sheeplined Cloth. Co.* v. *Arctic Fur Cap Corp.,* 165 F. Supp. 193 (S.D.N.Y. 1958) (involving Mr. Bader); *Stillman* v. *Edmund Scientific Co.,* 522 F.2d 798, 801 (4th Cir. 1975); *Shapiro* v. *Freeman,* 38 F.R.D. 308 (S.D. N.Y. 1965); *Hunter* v. *International Systems & Controls Corp.,* 56 F.R.D. 617, 631-2 (W.D. Mo. 1972); *Kaminski* v. *Shawmut Credit Union,* 18 F.R. Serv.2d 1508 (D. Mass. 1974); *R. De Bouard & Cie.* v. *S. S. Ionic Coast,* 46 F.R.D. 1 (S.D. Tex. 1969); *Osolin* v. *S. S. Colorado,* 1 F.R. Serv. 2d 599 (N.D. Calif. 1958).

B. There Are No Circumstances Disentitling Touche Ross to Its Reasonable Expenses.

Appellants contend (AMB 48-51) that Touche Ross should not have been awarded its reasonable expenses by reason of the following:

1. In an affidavit dated September 16, 1974, submitted by Mr. Eno, an error was made (JA 532). Mr. Eno had been informed and believed that all of the answers had come in one envelope (JA 212-213). He subsequently located one of the envelopes (JA 357), which was too small to accommodate the IIPL answers (JA 229-296), and concluded that there had been two mailings. Mr. Eno voluntarily corrected his erroneous statement at the hearing and voluntarily produced the envelope that had been found (JA 212-213).

While any error is to be regretted, as it is here, in this case the error was voluntarily corrected and played no part in the decision. The Court found that there were two mailings, one containing the IIPL answers and the other containing the answers of the individual plaintiffs (JA A27-28). Appellants' claim (AMB 50) that the second envelope was not produced because it would have shown two mailings is thus meaningless.

Although appellants state that the affidavit was "finally admitted" to be incorrect (AMB 48, 15), the fact is that prior to Mr. Eno's correction at the hearing the affidavit had not even been commented upon and not a single question was addressed to Mr. Eno about it at the hearing even after the correction was made (JA 213-217). And although appellants claim (AMB 49-50) that Mr. Eno "failed to explain the disappearance" of the second envelope, as noted, not a single question was addressed to him on this subject (JA 213-217). While it would have been unthinkable for him to have done so, had Mr. Eno not corrected his affidavit his statement could not have been disproved by any independent evidence. Mr. Eno thus voluntarily corrected his affidavit even though to do so supported Mr. Bader's claim of two mailings. This is entirely inconsistent

with appellants' claim that a "false", *i.e.*, deliberately deceptive, affidavit was filed.

2. Although Randolph did not appear at the hearings, Mr. Bader, almost two months after the hearings concluded, submitted an affidavit dated January 4, 1975 from Randolph in which he claimed to have mailed his answers on September 3, 1974 by 1:00 P.M. at a Post Office in San Diego, California (JA 623-624). The affidavit was obviously "tailor-made" in an attempt to show delivery could have taken place in New York on September 5.* In response, Mr. Eno noted that the Post Office had advised the Rosenman firm that even if Randolph had mailed his answers in San Diego on September 3, but if he had done so after 5:30 P.M. in a letter box, the answers would not have been delivered in New York on September 5 (JA 627). While appellants call this affidavit "misleading" (AMB 49), it showed the purpose for so carefully tailoring the Randolph affidavit as to an event allegedly occurring 4 months before and one not likely to be remembered.

3. In an affidavit Mr. Eno stated that, contrary to a claim made by Mr. Bader in a memorandum after the hearings, Mr. Bader had not on the argument on September 20, 1974 stated that Sands had been in his office on September 9 to read return addresses (JA 627). Appellants say (AMB 49) that the Court's notes refute Mr. Eno's statement. They do not. Appellants say that the Court's notes say "knew on 9th that Sands said." While even this would not confirm appellants' claim, this is not what the Court's notes say. Appellants have taken liberties with those notes and have run two separate things together (see JA 358). It is evident that the Court began to write a sentence beginning "Knew on 9th that" and did not complete it; and then later began another sentence starting "Sands said" and did not complete that.**

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* Indeed, appellants in their brief (AMB 12) have changed the time shown in the affidavit to 12:00 noon.

** One could complete these sentences to read "Knew on the 9th that Rosenman firm had sent a letter" (which is what Mr. Bader had said in his letter of September 11 [p. 11, *supra*]) and "Sands said he had mailed answers" (which is what Sands had said in his affidavit of September 17 [p. 11, *supra*]).

4. Appellants claim (AMB 50) that sanctions should not have been imposed because the Rosenman firm was automatically disqualified since Mr. Eno testified at the evidentiary hearing. This claim was not raised in the District Court and accordingly cannot be raised for the first time here. *Schwartz* v. *S. S. Nassau*, 345 F. 2d 465 (2d Cir.), *cert. den.*, 382 U.S. 919 (1965).

No question was raised at the hearing as to Mr. Eno testifying, nor was there any objection to his testimony or to any document he presented (JA 204 *et seq.*). Indeed, during the course of Mr. Eno's testimony Mr. Bader stated that he had no objection "to any of the evidentiary matter that has been brought into this hearing. It seems to me it is all pertinent" (JA 210). If there were any objection to the propriety of Mr. Eno testifying, it should have been noted at the time so that an appropriate ruling could have been made.

We know of no authority that the strictures of DR 5-102 of the Code of Professional Responsibility ("the Code") apply to events transpiring in the course of pre-trial proceedings such as those involved in this evidentiary hearing. If they did, lawyers could not make affidavits as to such proceedings. Attorneys must be in a position to inform the Court, by sworn testimony in written or oral form, of what has transpired in the proceedings pending before it, and the Court must resolve any disputes that arise in that regard.

Even if this were not the case, there would not have been any automatic disqualification because Mr. Eno testified. There are circumstances in which attorneys may testify without the need to withdraw. EC 5-10, DR 5-101(B)(4) of the Code; *French* v. *Hall*, 119 U.S. 152 (1886); *Hughes* v. *Wilson Sullivan Co.*, 261 App. Div. 39, 24 N.Y.S. 2d 534 (3d Dept. 1941); *Wolk* v. *Wolk*, 70 Misc. 2d 620, 333 N.Y.S. 2d 942 (Sup. Ct. 1972). Whether or not a firm is disqualified because a member testifies thus depends upon consideration of a variety of facts and the answer in each case depends upon the attendant facts.

POINT II

The notices of voluntary dismissal were ineffective.

The notices of voluntary dismissal under Rule 41(a)(1)(i) filed first on behalf of Randolph and later on behalf of IIPL, Fagan and Michael (pp. 13-14, *supra*) were ineffective. The notices were filed in October 1974 before the order of consolidation of November 18, 1974 (JA 594-596, 602). This action is a class action and there had not been at the time the notices were filed a determination that it was not a class action. The right to dismiss the action is therefore governed not by Rule 41(a)(1) but by Rule 23(e) which provides that "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

Rule 41(a)(1) expressly provides that it is "Subject to the provisions of Rule 23(e)," making clear on its face that it does not apply to class actions. The provision in Rule 23(e) that "a class action *shall not be dismissed* without court approval is mandatory .... Rule 23(e) is a recognized exception to the general applicability of Rule 41(a)(1), on voluntary dismissal before trial; . . . and it has been held that prior to the court's initial determination . . . as to whether an action brought as a class action is to be so maintained, the action must be presumed to be a class action subject to the requirements of [Rule] 23(e)." 3B Moore's, *supra* ¶23.80[2.-1]. *Accord*: *Kahan* v. *Rosenstiel*, 424 F.2d 161, 169 (3d Cir.), *cert. den.*, 398 U.S. 950 (1970); *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 42 F.R.D. 324, 326 (E.D. Pa. 1967); *Yaffe* v. *Detroit Steel Corp.*, 50 F.R.D. 481, 483 (N.D. Ill. 1970); *Gaddis* v. *Wyman*, 304 F. Supp. 713, 715 (S.D.N.Y. 1969).

The cases cited by appellants (AMB 58)—*Baxter* v. *Palmigiano*, 425 U.S. 308 (1976) and *Indianapolis School Comm'rs* v. *Jacobs*, 420 U.S. 128 (1975)—are not to the contrary. Those cases held that where a Court decides a case on the merits without making a class determination, the action is not to be deemed a class action. That has

nothing to do with dismissals of class actions prior to a class determination.

There is no merit to appellants' claim (AMB 59) that the notices could be filed because other class actions were pending. No such exception is made in Rule 23(e) and, if appellants were correct, where a number of class actions are pending Rule 41(a)(1) notices could be filed in, and terminate, all of them. If there are considerations making appropriate dismissal of a class action, they must be brought forth by motion under Rule 23(e).*

On October 15, 1974, Judge MacMahon "So ordered" the notice of voluntary dismissal that had been filed with respect to Randolph (JA 595). That was done *ex parte* without any notice to the "class" or to the Rosenman firm (JA 840, 628-629). The copy of that notice that had been served (JA 314-316) was entirely in blank and there was no provision in it for Court approval and no notice that Court approval would be sought. As Judge MacMahon subsequently found, that notice had been improperly presented to him instead of to Judge Owen, and had been inadvertently signed as a matter of routine without any awareness that it might affect the proceedings before Judge Owen (JA 838-841).

The notice as to Randolph did not purport to terminate the action. Indeed, it expressly stated that despite that notice, the action continued as a class action (JA 594). Jurisdiction of the Court over the action thus expressly continued.**

* The case appellants cite, *Papilsky* v. *Berndt*, 466 F. 2d 251 (2d Cir.), *cert. den.*, 409 U.S. 1077 (1972), which involved the *res judicata* effect of a Rule 37(b) dismissal for failure to answer interrogatories, is completely inapposite, except that it recognized that, as in a class action, a Rule 41(a)(1) notice of voluntary dismissal could not properly be filed in a stockholders' derivative action.

** This Circuit has held that a Rule 41(a)(1) notice of voluntary dismissal cannot be filed even in a non-class action to dismiss as to one party rather than to terminate the entire action. *Harvey Aluminum, Inc.* v. *American Cyanamid Co.*, 203 F.2d 105 (2d Cir.), *cert. den.*, 345 U.S. 964 (1953); *Neiman-Marcus Co.* v. *Lait*, 14 F.R.D. 159 (S.D.N.Y. 1953).

After Judge Owen had entered his order of January 9, 1976, Judge MacMahon on January 23, 1976, "So ordered" the notice as to IIPL, Fagan and Michael (JA 502), again, as he found, inadvertently as a matter of routine without any awareness that it might affect the proceedings before Judge Owen (JA 838-841). However, before Judge Owen took any further proceedings in the action, Judge MacMahon on December 8, 1976 vacated his "So ordered" provision as to both notices (JA 838-841).* Judge Owen subsequently denied appellants' motion to vacate his order of January 9, 1976 on the ground of the filing of the notices of voluntary discontinuance (JA 773 *et seq.*, 906).

The signature of a Court to a purported Rule 41(a)(1) notice of voluntary dismissal is ineffective. Such a notice, if appropriate, is effective upon filing with the Clerk of the Court without Court approval. *Miller* v. *Reddin*, 422 F.2d 1264 (9th Cir. 1970); *American Cyanamid Company* v. *McGhee*, 317 F.2d 295 (5th Cir. 1963). If, however, a party has no right to file such a notice, the Court has no power to endow it with validity by "So ordering" the notice. *Hyde Construction Co.* v. *Koehring Co.*, 388 F.2d 501 (10th Cir.), *cert. den.*, 391 U.S. 905 (1968). In that case, the Court of Appeals directed the District Court to vacate its signature to a Rule 41 notice of dismissal that a party had no right to file.

This Court on the aforesaid dismissed appeal, before Judge MacMahon had vacated his "So ordered" on the notices, stated that until adjudication by this Court of the ineffectiveness of the notices as filed, "it is by no means clear" that, with Judge MacMahon's "So ordered," the notices could be treated as "nullities" even though erroneous (542 F.2d at 157 n.2). However, as noted, the Randolph notice plainly did not deprive the Court of jurisdiction, the second notice was not "So ordered" until after Judge Owen had made his order of January 9, 1976, and both "So ordered" signatures were vacated before Judge Owen proceeded further and entered any further orders.

* Judge MacMahon clearly had the power to vacate his "So ordered" provision. *Marconi Wireless Co.* v. *United States*, 320 U.S. 1, 47 (1943); *United States* v. *Jerry*, 487 F.2d 600, 604-5 (3d Cir. 1973); *Thomsen* v. *Terrace Nav. Corp.*, 490 F.2d 88 (2d Cir. 1974). See also Rule 54(b). *Cf.* Rule 60(a).

POINT III

The District Judge was not required to recuse himself.

In October 1976, Mr. Bader wrote to Mr. Eno stating that while Mr. Bader was absent from his office, an unknown caller had left a message that Mr. Eno was "personally acquainted" with Judge Owen. Mr. Bader wanted to know whether such was the fact and the "extent" of such "personal acquaintance" (JA 885).

Mr. Eno responded by noting that Mr. Bader's reference was not to the unknown caller (who resembles the "unknown mailer") but to the fact that at the first meeting of counsel in this case before Judge Owen in January 1974, he had mentioned that he and Mr. Eno had met as adversaries many years before in the case of "Kaiser-Frazer Corporation v. Otis & Co." Mr. Eno went on to state that his contact with Judge Owen in that case had ended in 1951 and that in the ensuing 25 years, outside of the instant case, he recalled seeing Judge Owen on no more than four occasions: once when he appeared for an interview before the full Committee on the Judiciary of the Association of the Bar of the City of New York, of which Mr. Eno was then a member; twice by chance between acts at the opera; and once at a function at which a large number of other persons were present; and that on those occasions they had simply exchanged pleasantries (JA 886-887).

In January 1977, with no motion being made, Mr. Bader presented affidavits of Randolph and another member of IIPL stating that they believed that the facts that had been noted by Mr. Eno warranted Judge Owen recusing himself pursuant to 28 U.S.C. §455 and stating that they would have made the application at the time of the Rule 37 motion had they known them (JA 934-937). Neither of these affidavits, nor any other papers, claimed that Judge Owen was biased or prejudiced in any way.* Judge Owen declined to recuse himself (JA 941).

* No application was made under 28 U.S.C. §144, which prescribes the procedure to be followed where a claim is made that a judge "has a personal bias or prejudice" either against a "party . . . or in favor of any adverse party." See *Galella* v. *Onassis*, 487 F.2d 986, 997 (2d Cir. 1973).

Apparently appellants contend that recusal was "warranted" under §455(a), amended effective December 5, 1974, which provides that a judge shall disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." Amended §455, however, does not apply "to the trial of any proceeding* commenced prior to" December 5, 1974 (Pub.L. 93-512, §3, 88 Stat. 1609) and does not apply to Touche Ross' Rule 37 proceeding begun in September 1974 in which the evidentiary hearing was held in November 1974. *Duplan Corp.* v. *Deering Milliken, Inc.*, 400 F. Supp. 497, 504-5 (D.S.C. 1975); *In re Continental Vending Machine Corp.*, 543 F. 2d 986, 995 n.4 (2d Cir. 1976). At that time, when it is stated that the application would have been made had the facts been known, §455 provided that a judge shall disqualify himself when he "is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit . . . ." The question was one for the judge's conscience. *Weiss* v. *Hunna*, 312 F. 2d 711, 714 (2d Cir.), *cert. den.*, 374 U.S. 853 (1963); *Shadid* v. *Oklahoma City*, 494 F. 2d 1267 (10th Cir. 1974). There are numerous cases holding that acquaintanceship (or even friendship) with counsel or witnesses is not a ground for recusal.**

* Defined in amended §455(d)(1) as including "pretrial, trial, appellate review, or other stages of litigation."

** *Wolfson* v. *Palmieri*, 396 F. 2d 121, 123-4 (2d Cir. 1968) (judge not disqualified in criminal case because former law clerk was an assistant prosecutor, although defendants intended to claim prosecutorial misconduct); *Darlington* v. *Studebaker-Packard Corp.*, 261 F. 2d 903, 906-7 (7th Cir.), *cert. den.*, 359 U.S. 992 (1959) (judge not disqualified from hearing case against defendant who had been judge's client in private practice); *Simmons* v. *United States*, 89 F. 2d 591, 592-3 (10th Cir.), *cert. den.*, 302 U.S. 700 (1937) (allegations that judge had previously represented a government witness and the relative of another important government witness, and was "friendly inclined towards" them, do not require a judge's disqualification); *Bumpus* v. *Uniroyal Tire Co.*, 385 F. Supp. 711 (E.D. Pa. 1974) ("continued personal friendship" with one of party's counsel who had been judge's law partner no ground for disqualification); *Broome* v. *Simon*, 255 F. Supp. 434, 438 (W.D. La. 1965) (judge not disqualified although district attorney accused of wrongdoing in conjunction with defendants was considered by judge "to be a personal friend"); *Carr* v. *Fife*, 156 U.S. 494, 498 (1895) (no disqualification that judge had been attorney for some of the defendants on matters not connected with the case).

Amended §455 substituted a "reasonable man" test in determining whether the judge should disqualify himself, which is reviewable only for abuse of sound judicial discretion. *Davis* v. *Board of School Comm'rs*, 517 F. 2d 1044, 1052 (5th Cir. 1975), *cert. den.*, 425 U.S. 944 (1976). That same Court in *Parrish* v. *Board of Comm'rs*, 524 F. 2d 98, 102, 104 (5th Cir. 1975) (*en banc*), *cert. den.*, 425 U.S. 944 (1976), considered by the majority as though amended §455 applied, likewise held that acquaintance (or even friendship) with counsel or witnesses was not a ground for disqualification under the test applicable to amended §455. See to like effect under amended §455, *Hirschkop* v. *Virginia State Bar Ass'n*, 406 F. Supp. 721, 725 (E.D. Va. 1975). There is nothing respecting Mr. Eno's acquaintance with Judge Owen that remotely indicates that his refusal to recuse himself was an abuse of discretion.

Appellants also claim (AMB 62-64) that Judge Owen should have recused himself because, by making findings as to what occurred before him on the argument on September 20, 1974 and tendering his notes with respect thereto, he made himself a "material witness" in violation of prior §455, amended §455(b)(2) and Rule 605 of the Federal Rules of Evidence.* In every case a judge is "himself a witness—a witness of the witnesses" [*In re J. P. Linahan, Inc.*, 138 F.2d 650, 653 (2d Cir. 1943)], and is entitled to, and must, bring to bear in reaching his determination knowledge of what happens before him. He does not thereby make himself a "material witness" and become disqualified from acting. A judge is not disqualified because of "judicial" knowledge acquired by him in the course of proceedings before him, indeed, even from proceedings other than those presently before him.** *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *United States* v. *Scla-*

* Which did not become effective until July 1, 1975. Pub. L. 93-595, §1; 88 Stat. 1962.

** Amended §455(b)(1), which appellants also cited below, deals with "personal knowledge of disputed evidentiary facts concerning the proceeding"—knowledge from extra-judicial sources—and not "judicial" knowledge. See *Craven* v. *United States*, 22 F.2d 605, 607-8 (1st Cir. 1927), *cert. den.*, 276 U.S. 627 (1928).

fani, 487 F.2d 245, 255-6 (2d Cir.), *cert. den.*, 414 U.S. 1023 (1973); *United States* v. *DiLorenzo*, 429 F.2d 216, 220-1 (2d Cir. 1970), *cert. den.*, 402 U.S. 950 (1971); *Wolfson* v. *Palmieri*, *supra*; *Sperry Rand Corp.* v. *Pentronix, Inc.*, 403 F. Supp. 367 (E.D. Pa. 1975) (considering §455 as amended, p. 373 n. 11).

Neither of the cases cited to suggest disqualification [*In re Continental Vending Machine Corp.*, *supra*; *Winters* v. *Travia*, 495 F. 2d 839 (2d Cir. 1974)] is to the contrary. In neither case was the judge held disqualified, even though in *Continental Vending* the judge had actually taken the stand and given testimony on behalf of one party and against another. *Winters* has nothing to do with the present situation.*

POINT IV

An evidentiary hearing was not required to fix Touche Ross' reasonable expenses.

In his order of January 9, 1976, Judge Owen directed the submission of an affidavit within 30 days as to Touche Ross' reasonable expenses, including attorneys' fees, from September 6, 1974 in connection with the Rule 37 motion. Such affidavit detailed the work done, the hours spent, by whom they were spent, and other information, including the fact that Touche Ross had paid approximately $17,500 for such services (JA 657-660).

The Court, however, did not award this sum but only $7,500 (JA 942).** The Court had before it the work that

* Nor has *United States* v. *Bailey*, 468 F. 2d 652 (5th Cir. 1972), holding it not an abuse of discretion to excuse for cause a juror acquainted with the defendant in a criminal case. Although the situation of a juror is obviously different from that of a judge, it has also been held that acquaintance of a juror with witnesses or counsel is not a ground for disqualification. *E.g.*, *Kelly* v. *Gulf Oil Corporation*, 28 F. Supp. 205, 206 (E.D. Pa. 1938), *aff'd* 105 F. 2d 1018 (3d Cir. 1939); *United States* v. *Collins*, 395 F. Supp. 629, 635 (M.D. Pa. 1975), *aff'd* 523 F. 2d 1051 (3d Cir. 1975); *Lane* v. *United States*, 321 F. 2d 573, 577 (5th Cir. 1963), *cert. den.*, 377 U.S. 936 (1964).

** The Court also awarded $25 for witness fees and mileage, and $549.38 as the cost of the transcript of the evidentiary hearing which the Court found was required (JA 659, 942-943).

had been done: the motion papers submitted, the affidavits drawn, the letters exchanged, the very extensive briefs before and after the hearing, the hearing at which the Court had presided—all of which are part of the record on appeal. In reaching its determination, the Court stated that no evidentiary hearing was required because it was taking into account only the services of which the Court was personally aware, including the evidentiary hearing before it and the briefing that was done (JA 942).

This is not a case like *City of Detroit* v. *Grinnell Corporation,* 495 F. 2d 448 (2d Cir. 1974) or *Lindy Brothers Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.,* 487 F. 2d 161 (3d Cir. 1973), where hearings were necessary to determine what services had been rendered under the "equitable fund theory doctrine" to create, increase, protect or preserve a fund. Nor is it a case where the Court has to consider disputed matters outside the record before it in order to evaluate the services,* since Touche Ross requested no hearing.

Here the services considered by the Court were all in connection with the proceeding before the Court and the Court considered only the Rule 37 motion, affidavits, briefs and evidentiary hearing which had been submitted to, or which had proceeded before, him. Where the party rendering the services does not object, a Court may so limit its consideration and may on the basis of the material before the Court evaluate the need for the effort shown, the quality of the services and what they should reasonably cost. See *Montalvo* v. *Tower Life Building,* 426 F. 2d 1135, 1149-50 (5th Cir. 1970); *Stanolind Oil & Gas Co.* v. *Guertzgen,* 100 F. 2d 299, 302 (9th Cir. 1938); *Day & Zimmermann, Inc.* v. *Reid,* 168 F. 2d 356, 361 (8th Cir. 1948); *In re Mill City Plastics, Inc.,* 129 F. Supp. 86 (D. Minn.), *aff'd sub nom. Northtown Theatre Corp.* v. *Mickelson,* 226 F. 2d 212 (8th

* Thus, in *McFarland* v. *Gregory,* 425 F. 2d 443, 449 (2d Cir. 1970), not cited by appellants, where this Court ordered a hearing, the District Court had to take into account disputed facts not within the Court's ken, *i.e.*, the nature of the working environment provided to accountants and the difference in the actual and reasonable costs for failure to provide a proper environment.

Cir. 1955). As the *Lindy Brothers* case, *supra,* recognized (487 F. 2d at 169), a judge is presumed "knowledgeable as to the fees charged by attorneys in general and as to the quality of legal work presented to him by particular attorneys" and, since "expert testimony is not necessary to establish the value of a lawyer's services," courts have "sanctioned the award of attorneys' fees on the basis of affidavits without a hearing."

Appellants (ASB 4) note the statement in this Court's recent decision in *Browning Debenture Holders' Committee* v. *DASA Corp.*, Fed. Sec. L. Rep. (CCH) ¶96,131, at p. 92,088 (2d Cir. Aug. 11, 1977), which did not even deal with Rule 37 expenses, that the proper measure of attorneys' fees are those "reasonably required" and "not necessarily the amount actually incurred." The Court followed this injunction—it awarded less than one-half the amount actually incurred and based its determination only on the services of which it was personally aware.

POINT V

Appellants' other contentions are without merit.

With respect to appellants' contentions to which we have not already responded, the following shows that they are completely without merit:

A. The Contention That the Date for Compliance with the Court's Order Was September 9 and Not September 5, 1974.

Although at the hearing Mr. Bader categorically testified that he knew that the last day for compliance with the Court's order of August 16, 1974 was September 5—as his actions showed—and that he was "absolutely" aware that on September 9 he was already four days late (JA 38, 39, 12, 16, 21), appellants claim (AMB 25) that the time for compliance did not expire until September 9 because Rule 77(d) provides for service by the Clerk of notice of entry of an order by mail.*

* Mr. Bader knew of the order on August 16 because it was made in his presence (p. 5, *supra*).

Service by the Clerk is a mere accommodation service for the convenience of litigants. Advisory Committee Notes to 1948 Amendment of Rules 73(a) and 77(d), quoted in 12 Wright and Miller, *Federal Practice and Procedure*: *Civil* §3084; 7 Moore's, *supra*, ¶77.05, p. 77.10. Were this not so, every time a Court orders an act to be done by a particular date, a party would automatically have a 3-day extension in which to do the act; and if the Clerk failed to mail any notice, the party would not have to perform the act at all. Further, Rule 6(e) expressly provides that the 3-day extension where service is by mail is applicable only when a party is "required to do some act . . . within a prescribed period *after the service of a notice or other paper upon him* . . . ." (emphasis added). The District Court's order did not provide that further answers be served within a prescribed period after the service of a notice upon plaintiffs: it directed that answers be served within 20 days. Unless an order expressly provides that the act provided for shall be done within a period after service of notice, the Clerk's notification has no effect on the time for compliance with the Court's order. *Clements* v. *Florida East Coast Railway Company*, 473 F. 2d 668, 670 (5th Cir. 1973); *Sonnenblick-Goldman Corp.* v. *Nowalk*, 420 F. 2d 858, 860 (3d Cir. 1970).

B. The Contention That Michael Was Not a Plaintiff.

When Mr. Bader filed the amended complaint in January 1974, the name of Michael did not appear in the caption (JA 386). At all times thereafter, including Touche Ross' Rule 37 motion, Mr. Bader made clear that Michael continued to be a plaintiff, including moving on September 11, 1974 for an extension of time for service of his answers (*e.g.*, JA 499-501, 297-299, 458-460). Appellants nevertheless (although estopped by their conduct) state that the omission of Michael's name from the caption resulted in his elimination as a plaintiff and that he was not subject to the Court's order. We need not debate the law cited by appellants in this connection because a Rule 41(a)(1)(i) notice of voluntary dismissal being impermissible in a class action, obviously merely dropping a name from a caption is ineffective.*

* Appellants' intimation (AMB 8, 19) that Judge Griesa gave permission to drop Michael as a plaintiff is incorrect (JA 385).

Mr. Bader first sought to explain on the prior (dismissed) appeal from Judge Owen's order of January 9, 1976 the fact that after the service of the amended complaint he continued to treat Michael as a plaintiff. He then stated that he had not theretofore been aware that he had dropped Michael as a plaintiff because he was confused between the names Gary Michael and Michael Fagan (JA 808)—in which case he would have dropped Fagan as a party. There was no confusion. In its motion of August 2, 1974, Touche Ross specifically noted that Michael's name did not appear in the caption of the amended complaint,* and Mr. Bader nevertheless continued thereafter repeatedly to affirm that Michael was a plaintiff.

C. The Claim That There Were Mere "Irregularities" and That State Law Governs.

Appellants in effect ask the Court to ignore the findings that signed and sworn answers were not on hand when the unconformed copies were deliberately mailed to mislead. They ask that the matter be treated as though it involved merely some inadvertent technical defect. The findings of the District Court, based on the circumstances we have detailed at length, preclude such treatment.

Appellants say that under State law Mr. Bader could have verified the answers of the individual defendants himself. Rule 33(a), and not State law, governs the manner in which interrogatories are to be answered. Under that Rule, an individual's answers may not be verified by his attorney. *McDougall* v. *Dunn*, 468 F. 2d 468, 472 (4th Cir. 1972); *Jones* v. *Goldstein, supra*. Further, the order of August 16, 1974 directed that each plaintiff (Randolph, Michael, Fagan and IIPL) "respond separately and fully in writing under oath" (JA 415, 454). Even as to the IIPL answers, which it is claimed Mr. Bader could have verified

* Thus Touche Ross' moving affidavit of August 2, 1974 stated ". . . In the caption of the amended complaint, the name of Michael does not appear . . . . No order dropping Michael as a plaintiff has been requested or entered, and he remains a plaintiff—as the Answers [of IIPL dated July 11, 1974] indicate" (JA 406).

as General Counsel of IIPL, Sands, the Secretary of IIPL, swore that it was necessary that he verify them because he had "control" of its membership list and even the President of IIPL could not verify them (JA 636). The entire claim is irrelevant since the matter is to be judged not on the basis of what could have been done but on the basis of what was done.*

D. The Claim That Evidence Was Erroneously Admitted.

Appellants state (AMB 43-46) that it was error to admit into evidence the Court's notes respecting the argument on September 20, 1974, and Mr. Eno's testimony and memorandum as to what had then occurred. No objection was raised to any of these matters at the hearing and the objection is not available here. Rule 46; *United States* v. *Rose*, 525 F.2d 1026 (2d Cir. 1975), *cert. den.*, 424 U.S. 956 (1976). In any event, there is no merit to the contentions that an attorney can, because a reporter is not present, with impunity on argument make whatever statements he chooses; that such statements cannot be established by testimony; or that it is improper for an attorney to make notes of what transpires on an argument—and the cases cited by appellants (AMB 45) are in no respect to the contrary. And that a judge may use his own notes in reaching his determination is shown by the very case appellants cite, *Deep Sea Tankers, Ltd.* v. *The Long Branch*, 242 F.2d 433, 434 (2d Cir. 1957). Here Judge Owen tendered his notes in a spirit of fairness to give Mr. Bader a chance to explain.

* In October and December 1976, Mr. Bader filed purported powers of attorney to him from IIPL, Randolph and Fagan "nunc pro tunc" as of September 1, 1974 and August 29, 1974 respectively, which he contended retroactively gave him the power to sign the interrogatory answers of those parties had he chosen to do so (JA 767-772, 900-903). Although these purported powers are clearly ineffective for any purpose, appellants state (ASB 3) that the use "in this Circuit" of powers of attorney "to support interrogatory answers is well established," citing *Cuban Cigar Brands* v. *Upmann International, Inc.* (S.D.N.Y. 77 Civil 345). While the statement is unintelligible, what is to be noted is that the case cited is one in which Mr. Bader is involved and which he is apparently using in an attempt to create for the instant case a seeming "practice." Appellants' statement is indefensible and the matter is obviously irrelevant.

E. The Claim That Plaintiffs Were Entitled Under the Seventh Amendment to a Jury Trial.

Appellants (AMB 65-67, 68), referring to the Seventh Amendment, claim that, because plaintiffs had endorsed a jury demand on the original and amended complaints, they were entitled to a jury trial on the evidentiary hearing and on the question of reasonable expenses. None of the cases cited by appellants supports this contention.

Rule 38(b) expressly provides for a jury trial of "any issue triable of right by a jury." This is consonant with the Seventh Amendment which, by its terms, applies only to "Suits at common law" and which "preserves" the right to a jury trial of issues so triable under common law principles. 5 Moore's, *supra*, ¶38.08[5], p. 79 *et seq.* The issue before Judge Owen was whether the plaintiffs had failed to comply with his Rule 37(a) order, the circumstances relating thereto, and the sanctions to be imposed under Rule 37(b) for its violation. As to such an order, it is clear that it is for the Court alone to inquire where there has been a failure to comply with an order and to proceed accordingly; that it is improper to submit the question of disobedience to a jury; and that for the Court alone to act does not constitute "any invasion of the constitutional right of trial by jury." See, *In re Debs*, 158 U.S. 564, 594-5 (1895).

Conclusion

The order and judgment appealed from should be affirmed.

Respectfully submitted,

ROSENMAN COLIN FREUND LEWIS & COHEN
Attorneys for Defendant-Appellee
Touche Ross & Co.

GERALD WALPIN
JAMES K. NEVLING, JR.
Of Counsel

#6382

Affidavit of Service by Mail

In re:
Independent Investor Protective League v
Teleprompter Corporation

State of New York
County of New York, ss.:

Harry Minott,

being duly sworn, deposes and says, that he is over 18 years of age. That on October 3, 197 7, he served 3 copies of the within Brief in the above-named matter on the following counsel by enclosing said three copies in a securely sealed postpaid wrapper addressed as follows:

I. Walton Bader, Esq.
65 Court Street
White Plains, New York 10601

(Attorney for Appellants)

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 3rd day of October, 1977

Jack A. Messina

JACK A. MESSINA
Notary Public, State of New York
No. 30-2673500
Qualified in Nassau County
Cert. Filed in New York County
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